Bank Bumiputra (M) Bhd v SAL Enterprise Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W02–324 OF 1999
MOHD GHAZALI, DENIS ONG AND ARIFFIN JAKA JJCA
19 AUGUST 2005

Banking — Banker and customer — Overdraft account — Terms and conditions — Whether customer obliged to follow pre-disbursement conditions — Whether bank obliged to release funds in the face of customer's non-compliance with pre-disbursement conditions

Banking — Banks and banking business — Overdraft facility — Characteristics of

Banking — Banks and banking business — Overdraft facility — Terms and conditions — Effect of non-compliance with

The first respondent had applied for a term loan and bridging facility from the appellant. On 24 August 1984, the appellant granted the first respondent an overdraft facility of RM1.4m. The facility was offered subject to a number of terms as well as pre-disbursement and disbursement conditions. The facility was to be released in two tranches: the first trance of RM400,000 for the purchase of certain plots of land ('the land'); and the second tranch of RM1m for the development of bungalows on the said lands. The first respondent agreed to all the terms and conditions. By letter dated 29 August 1984, the first respondent wrote to the appellant requesting the release of the RM1.4mil facility. The appellant however replied stating that the first respondent had not complied with pre-disbursement conditions. On 26 February 1985, the first respondent wrote in requesting for a variation of the pre-disbursement conditions. On 9 May 1985, the first respondent wrote in again requesting for further variations in the conditions. By letter dated 15 June 1985, the appellant sent a revised/amender letter of offer to the first respondent, offering, inter alia, to release RM400,000 for the purchase of the lands subject to a solicitor's undertaking to refund the same in the event that the charge could not be registered for whatever reasons and also subject to the following pre-disbursement conditions, inter alia, receipt of the auditor's confirmation that paid-up capital of the first respondent had been increased to at least RM200,000. The balance was to be released upon the first respondent's compliance with the pre-disbursement conditions contained in the earlier letter of offer; including: (i) receipt of the auditor's confirmation that the paid up capital had been increased to at least RM250,000 in cash; (ii) an irrevocable power of attorney to be given by the landowners to the first respondent. The first respondent accepted the conditions in the revised letter of offer and also undertook to service the monthly interest and instalments promptly and regularly. Consequently, the appellant released RM400,000 to its solicitors who paid RM291,200 to the vendors leaving a balance of RM108,800 — claimed by the first respondent to meet expensed connected with the purchase of the lands. The first respondent then wrote to the appellant requesting that it be allowed to utilize the balance. The appellant by letter of 5 December 1985 requested the first respondent to provide details on the progress of the construction

project in order to consider the request to utilize the balance RM108,800. The appellant wrote to the first respondent again on 16 April 1986 requesting similar details and asking the first respondent to settle outstanding interest. The first respondent did not respond and the appellant recalled the facility and filed an action against the respondent for the return of sums extended to the first respondent in respect of the facility. In their defence and set-off, the respondents, inter alia, claimed that as the appellant had not released the whole sum of RM1.4m, it had breached the terms and conditions of the facility; there was a variance in the contract of guarantee without the consent of the second and third respondents thereby discharging them from liability. In the High Court, the Judge dismissed the appellant's claim. The trial judge agreed with the respondents that the facility granted by the appellant was a bridging loan facility repayable only when the houses were sold. By not releasing the balance of the facility but instead recalling it, the appellant was in breach of the agreement. The appellant appealed.

Held, allowing the appeal:

(1) The trial judge was wrong in his decision. The terms and conditions found in the said letter of offer read together with the said amended letter of offer clearly showed that the said facility was an overdraft facility. The terms and conditions laid down therein imposed an obligation upon the first respondent to service the interest charged on a monthly basis and which obligation the first respondent expressly undertook to fulfil. The said facility was given for specific purposes and the first respondent had to satisfy several conditions before the monies under the said facility could be released. The first respondent could not utilise the monies under the said facility for purposes other than that spelt out in the said letter of offer read together with the amended letter of offer (see para 29); *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 79 distinguished.

(2) The appellant was never in breach of the terms and conditions of the said facility when it did not release the balance of the monies to the first respondent under the first tranche. In relation to the second tranche,the monies available under it could not be released to the first respondent as the first respondent had failed to comply with the pre-disbursement conditions. There were no merits in the respondent's defence and set-off (see para 42).

(3) The first respondent was never in a position to proceed with the development of the said housing project as it did not possess a developer's licence at the material time. The first respondent could not have suffered any loss or damage as it was, at all material times, not even in a position to commence construction. The trial judge erred in accepting the first respondent's claim that it had suffered loss and damages totalling RM520,946.82 'which was more than enough to extinguish' the appellant's claim, notwithstanding the absence of evidence to support such a claim. The appellant was clearly not in breach of the terms and conditions of the said facility and had the right to recall the said facility on demand (see para 42).

(4) The second and third respondents were also liable under the guarantee as they undertook to pay any monies owing or remaining due to the appellant from

A the first respondent including interest and all cost, charges and expenses which the appellant may incur in making good any default by the first respondent (see para 43).

[Bahasa Malaysia summary

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Responden pertama telah memohon untuk satu pinjaman bertempoh dan kemudahan perantara daripada perayu. Pada 24 Ogos 1984, perayu telah memberikan responden pertama satu kemudahan overdraf sebanyak RM1.4j. Kemudahan itu telah ditawarkan tertakluk kepada beberapa terma dan juga syarat C pra pembayaran dan pembayaran. Kemudahan itu telah diberikan dalam dua peringkat: peringkat pertama sebanyak RM400,000 untuk belian plot tanah tertentu ('tanah tersebut'); dan peringkat kedua sebanyak RM1m untuk pembangunan rumah bungalow atas tanah tersebut. Responden pertama telah bersetuju terhadap semua terma-terma dan syarat-syarat berikut. Melalui surat bertarikh 29 Ogos 1984, D responden pertama telah menulis kepada perayu memohon pelepasan kemudahan RM1.4j itu. Perayu bagaimanapun menjawab dengan menyatakan bahawa responden pertama tidak mematuhi syarat pra pembayaran itu. Pada 26 Februari 1985, responden pertama telah menulis memohon syarat-syarat tersebut diubah. Melalui surat bertarikh 15 Jun 1985, perayu telah menghantar surat tawaran yang disemak semula/dipinda kepada responden pertama, menawarkan, antara lain, pelepasan E RM40,000 untuk belian tanah tersebut tertakluk kepada aku janji peguam untuk memulangkan yang sama sekiranya gadaian tersebut tidak dapat didaftarkan untuk apa alasan sekalipun dan juga tertakluk kepada pra pembayaran berikut, antara lain, menerima pengesahan juru audit bahawa modal berbayar responden pertama ditambah kepada lebih kurang RM200,000. Baki itu hendaklah dilepaskan setelah F responden pertama mematuhi syarat pra pembayaran yang terkandung dalam surat tawaran terdahulu itu; termasuklah: (i) penerimaan pengesahan juru audit bahawa modal berbayar telah ditambah kepada sekurang-kurangnya RM250,000 dalam wang tunai; (ii) surat kuasa wakil yang tidak boleh dibatalkan hendaklah diberikan oleh tuan punya tanah kepada responden pertama. Responden pertama menerima syarat-syarat dalam surat tawaran yang dipinda itu dan juga membuat akujanji untuk G membayar faedah dan ansuran bulanan dengan segera dan tepat. Berikutan itu, perayu telah melepaskan RM400,000 kepada peguamnya yang membayar RM291,200 kepada penjual meninggalkan baki sejumlah RM108,800 — yang dituntut oleh responden pertama untuk membayar perbelanjaan yang berkaitan dengan belian tanah tersebut. Responden pertama kemudiannya telah menulis H kepada perayu memohon agar ia dibenarkan menggunakan baki tersebut. Perayu melalui surat bertarikh 5 Disember 1985 meminta responden pertama mengemukakan butiran tentang perkembangan projek pembinaan bagi tujuan menimbangkan permohonan untuk menggunakan baki RM108,800 itu. Perayu telah menulis kepada responden pertama sekali lagi pada 16 April 1986 memohon I butiran yang sama dan menanyakan responden pertama untuk melangsaikan faedah yang tertunggak. Responden pertama tidak menjawab dan perayu telah menarik balik kemudahan itu dan memfailkan satu tindakan terhadap responden untuk mengembalikan jumlah wang yang diberikan kepada responden pertama berkaitan kemudahan itu. Dalam pembelaan dan penepian mereka, responden-responden, antara lain, telah menuntut bahawa oleh sebab perayu tidak melepaskan kesemua

jumlah RM1.4j, ia telah melanggar terma-terma dan syarat-syarat kemudahan itu, terdapat percanggahan dalam kontrak jaminan tanpa persetujuan responden kedua dan ketiga yang mana telah melepaskan mereka daripada liabiliti. Dalam Mahkamah Tinggi, hakim telah menolak tuntutan perayu. Hakim perbicaraan telah bersetuju dengan responden-responden bahawa kemudahan yang diberikan oleh perayu merupakan satu kemudahan pinjaman perantara yang perlu dibayar balik hanya apabila rumah-rumah itu dijual. Dengan tidak melepaskan baki kemudahan itu tetapi sebaliknya menarik baliknya, perayu telah melanggar perjanjian itu. Perayu telah mengemukakan rayuan.]

Diputuskan, membenarkan rayuan tersebut:

(1) Hakim perbicaraan terkhilaf dalam keputusannya. Terma-terma dan syarat-syarat yang terkandung dalam surat tawaran itu dibaca bersama surat tawaran yang dipinda jelas menunjukkan bahawa kemudahan itu merupakan satu kemudahan overdraf. Terma-terma dan syarat-syarat yang terkandung dalamnya meletakkan satu tanggungjawab ke atas responden pertama untuk membayar faedah yang dikenakan caj secara bulanan dan tanggungjawab responden pertama dengan jelas telah membuat aku janji untuk memenuhinya. Kemudahan itu telah diberikan bagi tujuan spesifik dan responden pertama perlu memenuhi beberapa syarat sebelum wang di bawah kemudahan itu boleh dilepaskan. Responden pertama tidak boleh menggunakan wang di bawah kemudahan itu bagi tujuan selain daripada apa yang ditetapkan dalam surat tawaran tersebut dibaca bersama surat tawaran yang dipinda itu (lihat perenggan 29); *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 MLJ 76 dibeza.

(2) Perayu tidak melanggar terma-terma dan syarat-syarat kemudahan itu apabila ia tidak melepaskan baki wang kepada responden pertama di peringkat pertama. Berkaitan peringkat kedua itu, wang yang sedia ada di bawanya tidak boleh dilepaskan kepada responden pertama kerana responden pertama telah gagal untuk mematuhi syarat pra pembayaran. Tiada merit dalam pembelaan dan penepian responden (lihat perenggan 42).

(3) Responden pertama bukan dalam kedudukan untuk meneruskan pembinaan projek perumahan itu kerana ia tidak memiliki lesen pemaju pada masa matan. Responden pertama tidak mungkin mengalami apa-apa kehilangan atau kerugian kerana, pada masa matan, ia tidak dalam kedudukan untuk memulakan pembinaan. Hakim perbicaraan telah terkhilaf dalam menerima tuntutan responden pertama bahawa ia telah mengalami kehilangan dan kerugian berjumlah RM520,946.82 'which was more than enough to extinguish' tuntutan perayu, meskipun ketiadaan keterangan untuk menyokong tuntutan sedemikian. Perayu dengan jelas tidak melanggar terma-terma dan syarat-syarat kemudahan itu dan mempunyai hak untuk menarik balik kemudahan itu atas tuntutan (lihat perenggan 42).

(4) Responden kedua dan ketiga juga bertanggungjawab di bawah jaminan itu kerana mereka telah membuat aku janji untuk membayar apa-apa wang yang tertunggak atau perlu dibayar kepada perayu daripada responden pertama

termasuklah faedah dan semua kos, caj dan perbelanjaan yang mungkin ditanggung oleh perayu akibat kegagaln responden pertama (lihat perenggan 43).

Notes

For cases on overdraft account, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1624–1626.

For cases on overdraft facilities, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1741–1752.

Cases referred to

Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 79 (distd)

Mayor Singh v Lau Geok Swee [1960] MLJ 285 (refd)

Legislation referred to

Rules of the High Court 1980 s 42

Appeal from: Civil Suit No C1–23–3570 of 1986 (High Court, Kuala Lumpur)

Alex de Silva (P Theyabaraja and SL Ling with him) (Shariff Thomas & Lau) for the appellant.

Davis Morais (Puteri Shehnaz Majid with him) (Kim & Partners) for the respondents.

Mohd Ghazali JCA (delivering judgment of the court):

[1] This appeal is against the whole of the judgment of the High Court dated 30 March 1999, which dismissed the appellant's claim (the plaintiff in the court below) following a trial of the action. The appellant's claim was for the sum of RM333,947.99, being a demand for repayment of sums disbursed under a facility granted, together with interest. The High Court dismissed the appellant's claim and hence, this appeal.

[2] The facts showed that sometime in 1984, the first respondent, a locally incorporated company applied for a term loan and bridging finance facility from the appellant. On 20 August 1984, by way of a letter of offer ('the said letter of offer') the appellant granted the first respondent an overdraft facility of RM1.4m ('the said facility'). The said letter of offer, inter alia, reads:

> Re: Your application for Term Loan & Bridging Finance
>
> facility of $1,422,083 under the Account No 7059-06
>
> With reference to the above we are pleased to inform you that the Bank has approved your application subject to the following terms and conditions:
>
> Facility: Overdraft for $1,4000,000
>
> Purpose: i) $400,000

For purchase of a land held under Lot PT 4672 to 4699 Mukim of Rusila, Trengganu. A

ii) $1,000,000

To finance the proposed development of 28 units single storey bungalow houses on the above mentioned lot.

Security: Against a first Legal Charge on Title No HSM B

2421 PT No 4672 to Title No HSM 2448 PT No 4699.

Pending issuance of QT, the facilities will be secured against:

i) Assignment of Sale and Purchase Agreement;

ii) Loan Agreement; C

iii) Charge-In-Escrow.

Guarantee: To be guaranteed jointly and severally by all the directors's of the Company in their personal capacities for $1,400,000.

Duration: For two years or upon completion of the project whichever is earlier. D

[3] It was also stated in the said letter of offer that the appellant 'may, at its absolute discretion vary the rate of interest from time to time and the variation shall take effect from the date specified in the notice'. On repayment, it was stated therein as 'To be reduced progressively against the release of titles, the redemption sum of which will E be determined later'. On disbursements, the said letter of offer reads:

Pre-Disbursement Conditions:

(i) Letter of Offer duly endorsed and returned to us.

(ii) Directors Guarantee duly executed, stamped and placed in our custody, F

(iii) Board of Director's Resolution authorising the acceptance of the facilities has been received.

(iv) Auditor's confirmation that the paid-up capital has been increased to at least $250,000 in cash.

(v) The Statutory Approval, ie Building Plan, Lay-out and Sub-division Plan and G Developer's Licence have been approved by the relevant authorities.

(vi) Charge documents duly executed and and presented for registration.

Disbursement Conditions:

(i) Upon compliance of all the above pre-disbursement conditions a sum of not less than H $400,000 for purchase of the land is to be released direct to the vendor through our solicitors with their undertaking to refund the monies so released in the event that the discharged sum cannot be registered for any reasons whatsoever,

(ii) The remaining balance of the facility is to be released progressively against Architect Certificate of work completed for the above project.

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[4] The said letter of offer further stated, infer alia, the following:

For your information, all facilities granted by us are subject to periodical review and repayable on demand.

You are kindly requested to read the abovestated terms and conditions very carefully. You are also requested to conduct your account satisfactorily. The Bank reserves the right to recall the facility if it is deemed to be necessary, although we do not anticipate exercising this right in normal circumstances.

[5] The first respondent accepted the offer and agreed to the terms and conditions stipulated in the said letter of offer. It would be convenient here to summarise that the said facility was for the following purposes:

(a) RM400,000 ('the first tranche') was for the purchase of lands held under Lots PT 4672 to 4699 Mukim of Rusila, Terengganu ('the said lands'); and

(b) RM1m (hereafter referred to as 'the second tranche') was to finance the proposed development of 28 units of single storey bungalow houses on the said lands ('the said housing project').

[6] The following events then took place:

(i) By letter dated 29 August 1984 the first respondent referred to the said facility and wrote, inter alia, as follows

> Re: OVERDRAFT FACILITY OF $1,400,000.00 (RINGGIT: ONE MILLION FOUR HUNDRED THOUSAND)
>
> The teleconversation of today between your Miss Ireen and our Mr CS Lim, refers to the Overdraft facility for $1,400,000:
>
> a) $400,000 to Purchase Land
>
> We would appreciate if you kindly release us the sum of $400,000 immediately to enable us to settle the balance of the purchase of the land held under PT No 4672 to 4699 Mukim of Rusila, Trengganu.
>
> b) $1,000,000 to Finance the Construction
>
> We would appreciate your release, upon statutory approval of building plans, lay-out and sub-division plans and developers' licence approved by the relevant authorities.

(ii) The appellant replied on 7 September 1984 by letter which, inter alia, read as follows:

> For your information, none of the conditions under the said term Pre-Disbursement Conditions) has been complied with except for the acceptance of our letter of offer date 20 August 1984 (copy enclosed).

(iii) By letter dated 26 February 1985, the first respondent referred to the said letter of offer and wrote as follows:

> We refer to your letter of offer dated 20 August 1984 and should be grateful if you could do away with part of pre-disbursement conditions No (V) which requires approval of building plans and the developer's licence before $400,000 can be released to the Vendor through your solicitors.
>
> As you would appreciate, we cannot now as yet apply for building plan and developer's licence as the land is not yet registered in our name.

(iv) By letter dated 28 March 1985, the appellant reminded the first respondent that they have not complied with the following pre-disbursement conditions as stated in the said letter of offer, namely, they have yet to receive the directors' guarantee duly executed and stamped, the board of director's resolution authorising the acceptance of the facilities and the auditor's confirmation that the paid-up capital of the first respondent has been increased to at least RM250,000 in cash. The appellant sent a further reminder by letter dated 16 April 1985. The evidence showed that the first respondent's board of directors passed the resolution authorising the acceptance of the facility only on 7 April 1985.

(v) By letter dated 9 May 1985, the first respondent requested that the requirement in respect of its paid-up capital be reduced from RM250,000 to RM200,000. On 11 June 1985, the first respondent's auditors confirmed that its paid-up capital as on that date was RM200,300 consisting of 200,300 ordinary shares of RM1.

(vi) On 14 June 1985, the first respondent's directors, viz, the second and third respondents and one Datuk Mohd Ariff bin Haji Ibrahim (who was the third defendant in the court below but not a party to this appeal) executed the guarantee as required by the appellant. That letter of guarantee, inter alia, reads:

> In consideration of you having agreed to advance credit facilities to... SAL ENTERPRISE SON BHD... (hereinafter called 'the Borrower') up to the sum of... ($1,400,000)... We, Haji Mohd Saldi bin Hqji Ibrahim [IC No: 2828353), Sufian bin Mohd Said (IC No 4386730) and Datuk Mohd Ariff bin Haji Ibrahim (ie No: 1512151) (hereinafter called 'The Guarantors') HEREBY AGREE with and Guarantee you as follows:
>
> 1. I/We will pay you on demand as follows:
>
> (i) The sum of;... ($1,400,000) (hereinafter called 'the Guaranteed Sum') and any part of the moneys hereby guaranteed which is now or shall at any time be owing or remain due and unpaid to you from the Borrowers.
>
> (ii) interest as the aforesaid rate or at such other rate as may be determined by the Bank from time to time.
>
> (iii) commission and other expenses and all cost charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any part of the moneys hereby guaranteed and to make good any default by the Borrower or its successors-in-title in payment of the sum hereby guaranteed or any part thereof.

(vii) By letter dated 15 June 1985 ('the said amended letter of offer') the appellant wrote to the first respondent as follows:

> Re: Overdraft facility for $1.4 Million Account No: 7059-06
>
> The above matter refers.
>
> Please be advised that the Bank has made the following decision on the requests submitted by your goodselves:
>
> (i) to exempt Mr Lirn Chan Soon from having to sign the letter of guarantee

(ii) to release the $400,000 to meet the purchase price of the land direct to the vendor through our solicitors upon their undertaking to refund the same in the event that the charge could not be registered for any reasons what so ever subject to compliance of the following pre-disbursement conditions:

(a) Auditor's confirmation that the paid-up capital has been increased to at least $200,000 in cash.

(b) A fresh Directors' Guarantee be taken excluding the name of Mr Lim Chan Soon. (The existing guarantee includes his name).

(iii) The remaining balance of the facility could only be released as per paragraph (ii) under 'Disbursement conditions' in our letter of offer dated 20 August 1984, upon compliance of all pre-disbursement conditions including:

(a) Auditors' confirmation that the paid-up capital has been increased to at least $250,000 in cash (as in the original terms and conditions) plus one (1) additional condition ie.

(b) Since the land to be developed is under the name of a third party, an irrevocable power of attorney is to be given by the land-owner to yourselves.

(iv) Interest is to be charged at 14.75% per annum (ie 3.5% above our Base Lending Rate which is presently 11.25% p.a.) and to be serviced monthly.

Therefore, you are to sign an undertaking to this effect.

(viii) The first respondent accepted the above-mentioned terms and conditions laid down in the said amended letter of offer and undertook 'to service the monthly interests and instalments promptly and regularly'. The appellant consequently released the sum of RM400,000 to its solicitors, Messrs Abdullah, Abd Rahman & Co to meet the purchase price of the said lands which has to be paid direct to the vendor as required by the appellant and agreed to by the first respondent. However, by letter dated 26 June 1985 Messrs Abdullah, Abd Rahman & Co informed the appellant as follows:

Dear Sir

OVERDRAFT FACILITY FOR $1.4 MILLION — ACCOUNT NO: 7059-06

With reference to the above matter we wish to inform you that the balance of the Purchase Price is only $291,000 and not $400,000. We have thus remitted $291,200 to the Vendor vide acknowledgment receipt dated 25 June 1985 a copy of which is enclosed herewith for your retention.

In our hands now we have a balance of $108,800. Messrs SAL Enterprise Sdn Bhd has requested that this balance sum of $108,800 be handed over to it for other necessary expenses such as fees for Lawyers, Architects and valuers, travelling expenses by the Directors to the Lands and other expenses connected to the purchase of the lands.

(ix) We should be grateful if we could at your earliest convenience give further instructions as to what we have to do with this balance sum of $108,800.

(x) By letter dated 24 July 1985, the appellant informed Messrs Abdullah, Abd Rahman & Co that the first respondent's request for the release of the said sum of RM108,800 to meet other expenses is rejected and requested for the return of that said sum.

(xi) By letter dated 22 October 1985 to the appellant, the first respondent requested that it be allowed to utilise the said sum of RM 108,800 which it intended to use also to pay the interest outstanding under the said facility amounting to RM13,940.56 due to the appellant.

(xii) By letter dated 5 December 1985, the appellant requested the first respondent to provide details on the progress of the said housing project for it to consider the request made by the first respondent to utilise the said sum of RM108,800.

(xiii) By letter dated 14 February 1986, the appellant wrote to the first respondent as follows:

> Re: Overdraft Facility For $1.4 Million Approved Under Account No 015-7059-06 With Our Wisma Damansara Branch
>
> We refer to your letter date 15 January 1986 addressed to the Manager of our Wisma Damansara Branch whereby you appealed for the release of the $108,800 being the balance of the $400,000 overdraft facility approved for the purchase of the land at Mukim Rusila, Terengganu.
>
> Before we can reach to any decision, kindly provide us with the following information:
>
> (i) Whether the statutory approvals with regard to the building plan, lay-out and subdivision plan and developer's licence have been approved by the relevant authorities. If so, please submit a copy of the approvals.
>
> (ii) Whether the paid-up capital has been increased to $250,000 in cash. If so, please submit the auditor's confirmation.
>
> (iii) Whether any work has commenced on the proposed project (to be certified by the architect).
>
> Further, we also note that you have failed to service on the monthly interest charged on the $291,200 being the partial sum released to pay the balance of the purchase price of the land. As a result, the account is now showing the following balance:
>
> Balance As At 14 February 1986 — $319,194.69
>
> Limit — $291,200
>
> Excess — $27,994.69 (due to interest accumulation).
>
> Therefore, we would appreciate it if you could settle the excess of $27,994-69 in the account as soon as possible or submit an acceptable proposal for our consideration.
>
> We hope to receive your reply within two weeks from the date of this letter, otherwise, we would consider your appeal on the available information.

(xiv) Since there was no response, by letter dated 16 April 1986, copies of which were also extended to the directors of the first respondent, the appellant informed the respondents that it has decided that the said facility is to be recalled. That letter reads:

> Re: Overdraft facility of $1.4m Under account number 015-07059.06
>
> We refer to the above matter.

> Please be informed that the Bank has reviewed your overdraft facility and has decided that the abovesaid facility is to be recalled.
>
> For your further information, we append below the outstanding balance as at todate:
>
> Facility Balance Approved Limit Present Limit Outstanding as at 16 April 1986
>
> Overdraft $1,400,000 $291,200 $326,115.92
>
> Therefore, you are hereby given fourteen days (14) notice from the date of this letter to effect settlement of the outstanding balance of $326,115.92 plus interest thereafter until full settlement failing which legal action will be taken against you.
>
> Kindly take note that when credit facility has been recalled but is unpaid upon expiry of this recall notice, the Bank will charge a maximum rate of 4.5% per annum above our Base Lending Rate (presently the Bank's Base Lending Rate is 9.75% per annum).

[7] There was no response from the first respondent as well as its directors as a result of which on 25 October 1986 the appellant filed this suit against the first, second and third respondents and the said Datuk Mohd Ariff bin Haji Ibrahim claiming that as at 31 May 1986 there was a sum of RM333,94.99 due to the appellant in respect of the said facility with interest thereon at the rate of 14.25% pa on monthly rests basis from 1 June 1986 until payment.

[8] In their 'defence and/or set-off (as alternative to defences on the merits)', the respondents contended, inter alia, as follows:

(i) that the appellant has not released the whole sum of RM1.4m to the first respondent and had as such breached the terms and conditions of the said facility;

(ii) as the appellant has not released the whole amount of the said facility, there is a variance of the contract of guarantee without the consent of the second and third respondents as guarantors and as such ought to discharge them from any liability;

(iii) alternatively, if, which is denied, the respondents are liable to the appellant, the respondents will seek to set-off against such liability the sum claimed as estimated profit, viz, RM520,946.82 due from the appellant to the respondents as claimed;

(iv) by virtue of the appellant failing and or refusing to release the whole of the said facility to the first respondent in breach of the agreement to grant the said facility, the first respondent has suffered losses and damages in that it was unable to proceed with the said housing project.

[9] At the outset of the trial in the High Court, the respondents' counsel informed the court that:

(i) the said Datuk Mohd Ariff bin Haji Ibrahim, viz., the third defendant in the court below, a director and guarantor of the first respondent, is a bankrupt;

(ii) that there is no counter-claim but there is a set-off;

(iii) that the reply to the counter-claim includes the reply to the set-off.

[10] At the end of the trial, the learned trial judge dismissed the appellant's claim and hence, this appeal.

[11] Before the learned trial judge, the respondents contended the following:

(a) that by failing to release the remainder of the amount approved under the said facility, the appellant was in breach of the agreement as result of which the first respondent was unable to proceed with the said housing project and had therefore suffered loss and damages totalling RM520,946.82, which the respondents sought to set-off against the appellant's claim so as to extinguish the claim;

(b) that on a true construction of the said letter of offer which constituted the agreement, the said facility was a bridging-loan facility to finance the said housing project and to be repayable only after the houses were sold and hence by not releasing the remainder of the said facility and instead recalling the same before repayment was due, the appellant was in breach of the agreement.

[12] The learned trial judge agreed with the respondents that 'it was a bridging loan facility repayable only when the houses were sold, and that by not releasing the balance of the facility but instead recalling it' the appellant was in breach of the agreement.

[13] In relation to the set-off, the learned trial judge said:

> For proof of damages in the form of loss of expected profits from the project, the defendants relied on their statement of projected estimated profits which was submitted to the plaintiffs and with the knowledge that of which the plaintiffs approved the loan. The reasonableness of the estimate had not been questioned. As neither from the cross-examination of the fourth defendant nor in the submission of the plaintiff's counsel could I find that the first defendants would not have made any profits or would have made profits only of a certain amount which would be less than the amount claimed by the defendants, I had to accept the amount of RM520,946.82 as the first defendants' losses, which was more than enough to extinguish the plaintiffs' claim. I therefore dismissed the plaintiffs' claim.
>
> In any event, the claim against the second defendant had to be dismissed because there was no proof that he had been served with a demand for payment.

[14] Before us, the appellant's counsel insisted that the said facility was an overdraft facility and this can clearly be seen from the said letter of offer. He pointed out the facts showed that the first respondent did not comply with the pre-disbursement conditions and delayed in pursuing the matter. The first respondent even wanted to change the guarantors and upon its request the appellant agreed to exclude one Lim Chan Soon as one of the guarantors. Simply put, the balance of the monies could not be disbursed because of non-compliance of the pre-disbursement conditions by the first respondent.

[15] The appellant's counsel further pointed out that the purpose of the first tranche of the said facility, viz, the amount of RM400,000, was for the purchase of the said lands. The evidence showed that the said lands were purchased in the name of the third respondent. The sale and purchase agreement showed that the third respondent purchased the same from one Noriah bte Ashari for the sum of RM364,000. The transfer forms (Form14A) were executed on 11 October 1984. A deposit of RM72,800 was paid by the third respondent as purchaser thus leaving a balance of RM291,200. The appellant released the first tranche, viz. the sum of RM400,000 to its solicitors and the solicitors paid the said sum of RM291,200, ie, the balance sum of the purchase price for the said lands to the vendor on 25 June 1985 as that was the only sum then due to the vendor. The appellant's solicitors returned to the appellant the balance sum of RM108,800. The appellant's counsel pointed out the appellant declined to release that sum of RM 108,800 direct to the first respondent upon its request as the first respondent wanted to utilise that sum for a different purpose, namely, to use it for expenses such as fees for lawyers, architects and valuers and travelling expenses by its directors.

[16] The appellant's counsel stressed that the purpose of the first tranche of RM400,000 was for the purchase of the said lands. As such, the appellant was not wrong in declining to release that sum of RM108,800 to the first respondent upon its request. Counsel then submitted the respondents are liable to pay interest on the said sum of RM291,200 released under the first tranche pursuant to the terms and conditions as laid down in the said letter of offer read together with the said amended letter of offer.

[17] In the course of the appellant's submission, the respondents' counsel interjected to say he agreed with all the above facts and informed this court that he would only be raising one issue, namely, that the repayment clause found in the said letter of offer denotes that the said facility was a bridging loan.

[18] In answer to this, the appellant's counsel pointed out that in their defence and/or set-off, the respondents clearly admitted that it was an overdraft facility; they never pleaded that it was a bridging loan. Counsel then referred to the following paragraphs in the respondents' defence and/or set-off, namely:

> 3. Save that the first defendant had applied for an overdraft facility ofRM1.4m, the rest of paragraph 6 of the statement of claim is denied and the plaintiff is put to strict proof thereof. Further the defendants contend and will contend that the plaintiff had not released the whole sum of RM1.4m to the first defendant and have as such breached the terms and conditions of the overdraft facility which the plaintiffs had themselves imposed.
>
> 5. The second, third and fourth defendants contend and will contend that as the plaintiff had not released the whole of the overdraft facility, there is a variance of the contract of guarantee without the consent of the second, third and fourth defendants as guarantors and as such ought to discharge them from any liability.
>
> 10. The defendants repeat paras 1–8 of the defence herein above. By virtue of the plaintiff failing and or refusing to release the whole of the overdraft facilities to the first defendant in breach of the plaintiff's agreement to grant the said facilities, the first defendant has suffered losses and damages in that it was unable to proceed with the development of the project for which the overdraft facilities had been applied for.

[19] Counsel argued the above showed the fact that it was an overdraft facility was not disputed. He pointed out it was only raised in the trial that it was a bridging loan. He then referred to *Mayor Singh v Lau Geok Swee* [1960] MLJ 285 where it was held that a party cannot raise issues of fact which were never pleaded before the trial court.

[20] In opposing the appeal, the respondents' counsel submitted they are not disputing that the said facility was not an overdraft facility, but it is their case that the manner in which the said facility was granted as described in the said letter of offer was such a facility that can only be recalled after the commencement of construction of the said housing project and when progressive payments are received from the end-purchasers, i.e., the ultimate buyers of the houses. That being the position, it was a bridging loan. He then referred to Bank *Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 where as to what is a bridging loan was discussed. In delivering the judgment of the Supreme Court, Abdul Hamid Omar LP said (at pp 84–85):

> According to Encik Arsam, an overdraft had two things in common, ie: (i) the drawdown of the loan is by way of issue of charge; and (ii) there is no fixed period. He said that what the bank had granted to the first respondent in exh P2 was not an overdraft facility, but a bridging finance operated under an overdraft. Bridging finance is a facility to finance the construction of the houses by the first respondent. The finance is to bridge the period between the time when the developer starts to prepare the ground works and the period when the developer will start to receive the proceeds of sales of the houses from purchasers which is when the sale and purchase agreements are signed.
>
> Thus the first respondent would receive 10% of the sale price of a house when it enters into a sale and purchase agreement with a purchaser. Upon receipt of this 10%, the first respondent would pay over the same to the bank to reduce its indebtedness to the bank. Similarly, when a purchaser pays to the first respondent a second instalment under the sale and purchase agreement upon certification by the architect that a certain stage of the house was completed, the first respondent would pay this over to the bank; and this procedure would continue until the house was completed, and by which time the purchaser would have paid the total sale price of the house and, if all houses are sold, the bank would by then be repaid all their money plus interest.
>
> It follows that until the first respondent commenced receiving the proceeds of sale from the house purchasers, it was under no obligation to pay to the bank anything towards the principal sum or towards the interest. But the bank had to fulfill its obligation to the first respondent in providing the bridging finance, otherwise the project would fail, in which case the first respondent would suffer losses and the bank would not be able to recover its money plus interest.
>
> The bridging finance is the amount which the bank, after careful study, finds to be what the first respondent actually needs to carry out the works on the land, before the first respondent starts to get income from the project.

[21] The respondents' counsel however conceded that the facts of *Mae Perkayuan* were different from the facts in this instant appeal and that he is not disputing that the said facility was an overdraft facility but notwithstanding that he argued that the appellant has breached the agreement by only releasing RM291,200 and by recalling the said facility. He stressed that the first respondent could not progress further because it did not receive the balance of the funds. He then pointed out that in his

evidence, the third respondent stated that the said facility is a bridging loan. In relation to this, the witness statement of the third respondent showed as follows:

> Q: How would you describe this facility?
>
> A: This is actually a bridging loan.
>
> Q: Why do you call this a bridging loan?
>
> A: Because re-payment is only to be made after the units are constructed, sold and payments are received from the end purchasers. You will see this under the caption 'Repayment' at p 2 of ABD-1.
>
> Q: If this is a bridging loan, why is this facility expressed as an 'overdraft'?
>
> A: This is the way in which the monies are to be disbursed, ie through an overdraft account.
>
> Q: What was the balance owing on purchase price of the land when you applied for the loan?
>
> A: RM291,200.
>
> Q: If that is so, why is the first tranche for the purchase of the land, RM400,000?
>
> A: This is because the balance of over RM100,000 was intended to be used to cover pre-construction costs such as the director's expenses, clearing the land and submission of layout and building plans.

[22] The respondents' counsel pointed out the third respondent's averment that the said facility was a bridging loan was 'never seriously challenged nor submission made to rebut at the trial'. In relation to paras 3, 5 and 10 of the respondents' defence and/or set-off, reproduced earlier, counsel conceded that the words 'bridging loan' did not appear therein but he argued the said letter of offer and the evidence of the third respondent clearly showed that the said facility was a 'bridging loan' although it was categorised as 'an overdraft facility'.

[23] The learned trial judge agreed with the respondents that 'it was a bridging loan facility repayable only when the houses were sold, and that by not releasing the balance of the facility but instead recalling it' the appellant was in breach of the agreement and such, he dismissed the appellant's claim.

[24] We are of the view that the main question which we would need to determine is whether the learned trial judge was right in deciding that the appellant was in breach of its obligations owed to the first respondent when it released a sum of RM291,200 only under the first tranche and refused to release the balance of the said facility.

[25] It was a term of the said letter of offer that the first respondent must first satisfy the 'Pre-Disbursement Conditions' before the appellant would release the monies. It was not disputed that from August 1984 to June 1985, the first respondent had not complied with any of the pre-disbursement conditions. On 15 June 1985, upon the request of the first respondent, the appellant agreed to vary the terms of the said letter of offer as follows:

(i) that the appellant would release the first tranche, viz RM400,000 to meet the purchase price of the said lands direct to the vendor through its solicitors upon their undertaking to refund the same in the event that the charge could not be registered for any reasons what so ever subject to compliance of the following pre-disbursement conditions:

(a) the auditor's confirmation that the first respondent's paid-up capital has been increased to at least RM200,000 in cash;

(b) a fresh directors' guarantee be taken with the exclusion of the said Lim Chan Soon as guarantor;

(ii) that the remaining balance of the said facility could only be released as per para (ii) under 'Disbursement conditions' as stated in the said letter of offer dated 20 August 1984, upon compliance of all pre-disbursement conditions including:

(a) the auditor's confirmation that the first respondent's paid-up capital has been increased to at least RM250,000 in cash as stated in the said letter of offer dated 20 August 1984;

(b) that since the said lands to be developed is under the name of a third party, viz, the third respondent, an irrevocable power of attorney is to be given by the third respondent, as land-owner to the first respondent; and

(iii) that interest will be charged at 14.75% per annum, ie, 3.5% above the appellant's base lending rate then at 11.25% per annum and to be serviced monthly.

The first respondent accepted the above terms and conditions and expressly undertook to pay and service the interest on a monthly basis.

[26] Consequently, the appellant released the said monies comprising the first tranche, ie RM400,000 to their solicitors for onward transmission to the vendor, ie the third respondent. As the balance purchase price for the said lands was only RM291,200, the appellant's solicitors released only that amount to the vendor and refunded the excess balance of RM108,800 to the appellant. The first respondent consequently applied to the appellant to release that excess balance RM108,800 purportedly for payment of other necessary expenses such as fees for lawyers, architects and valuers, travelling expenses by the first respondent's directors and other expenses connected to the purchase of the said lands. The first respondent later made another request by letter dated 22 October 1985 for that said amount of RM108,800 which it explained will also be used to pay interest outstanding under the said facility then amounting to RM13,940.56. The appellant turned down the request and in our view quite rightly so under the circumstances seeing that the said letter of offer and also the said amended letter of offer clearly stated that the monies under the first tranche was for the purpose of the purchase of the said lands and was to be paid directly to the vendor through the appellant's solicitors.

[27] Further, it was not disputed that as at 14 February 1986, the outstanding balance owing under the first tranche stood at RM319,194.96 against the drawing

limit of RM291,200, thereby creating an excess of RM27,994.96. It was also not disputed that since the release of the sum of RM291,200 under the first tranche, the first respondent failed to service the monthly interest or make any payments whatsoever to the appellant, it was further not disputed that at all material times, the first respondent had not commenced construction of the 28 units of single storey bungalow houses on the said lands and had yet to obtain a housing developer's licence.

[28] For the above reasons, we are of the view that the learned trial judge was wrong in making the decision that he did. The terms and conditions found in the said letter of offer read together with the said amended letter of offer clearly showed that the said facility was an overdraft facility. The terms and conditions laid down therein imposed an obligation upon the first respondent to service the interest charged on a monthly basis and which obligation the first respondent expressly undertook to fulfill. The said facility was given for specific purposes and the first respondent has to satisfy several conditions before the monies under the said facility could be released. The first respondent cannot utilise the monies under the said facility for purposes other than that spelt out in the said letter of offer read together with the said amended letter of offer.

[29] The respondents themselves conceded that the said facility was an overdraft facility. The respondents in their defence and set-off admitted that the said facility granted was an overdraft facility and had repeatedly referred to the same as an overdraft facility in their pleadings. Further, all documentary evidence referred to at the trial clearly referred to the said facility as an overdraft facility. Nowhere is the facility referred to as a bridging loan. The words 'bridging loan' only surfaced when the third respondent took the stand at the trial as a witness for the respondents.

[30] Before us, learned counsel for the respondents incessantly referred to *Mae Perkayuan* although he did concede that the facts there were different from the facts of this instant appeal. In *Mae Perkayuan*, the appellant, Bank Bumiputra (M) Bhd Kuala Terengganu ('the bank') gave to the first respondent there ('the company') an overdraft facility also made up of two tranches which were as follows:

(i) the first tranche of RM2.4m was as building finance for a proposed development of six lots of land in Dungun, Terengganu belonging to 'Yang Teramat Mulia Yang Di-pertuan Muda, Terengganu (now DYMM Sultan of Terengganu)'; and

(ii) the second tranche of RM2.1m was to purchase a piece of land in Alor Gajah, Melaka, including incidental cost of RM100,000.

[31] In the bank's letter of offer, dated 25 June 1983, it was clearly spelt out under a paragraph entitled 'Disbursement' that the first tranche was a 'Bridging finance for RM2,400,000' and that 'it was to be released progressively against architect's certificate of completion, after compliance of all conditions precedent and security document on the properties in Dungun have been executed and consent to charge has been obtained'. On 'repayment' the bank's letter of offer stated as follows:

To be reduced progressively by way of redemption sums for the proposed housing development in Dungun. The redemption sum shall also cover the facility for land purchase and is to be fixed later, upon request for release of tiles to end-financiers.

[32] The company accepted the terms and conditions as specified in the bank's letter of offer. At the end of July 1985, although there was evidence that the company had completed the earthworks and site preparation, there was no evidence that the amount disbursed by the bank had not been spent by the company for purposes of the development of the Dungun project. On 30 July 1985, the bank's head office in Kuala Lumpur issued a directive to the bank to say, inter alia, that 'it has already been decided the customers service the monthly accruing interest since November 1984 and to take steps to regularize the position of their account failing which the facility to be recalled'. On 14 October, the bank wrote to the company to say that it has decided to withdraw the facility and that legal action will be taken. On 21 July 1986, the bank caused a writ to be issued for recovery of the amount owing on the overdraft facility. The company and its guarantors filed a defence and counterclaimed for breach of contract and special damages of RM45m and general damages.

[33] In the High Court, the learned trial judge found that RM2.1m had been disbursed for the purchase of the land in Alor Gajah and that a total sum of RM1,104,286.50 had been disbursed by the bank upon the production of architect's certificates showing that the works specifed therein had been completed. At the end of the day the learned trial judge found that the bank had committed a breach of the bridging loan and dismissed the bank's claim. He allowed the counterclaim of the company and awarded damages of RM6m for the Dungun project and RM6m for the Alor Gajah 'project', a sum of RM5m as aggravated damages for injury allegedly suffered by the Sultan of Terengganu and ordered payments totalling more than RM1.7m to be made by the bank to third parties. The bank appealed against the learned trial judge's conclusion that it had committed a breach of the agreement and also against the quantum of damages awarded on the counterclaim against it.

[34] In allowing the appeal in part, the Supreme Court, inter alia, held:

(i) there had been negotiations between the bank and the company before the bank gave the bridging finance in the terms appearing in the agreement and that the bank knew that the company would receive no income whatosever from the project until sale and purchase agreements were signed; until the company commenced receiving the proceeds of sale from the house purchasers it was under no obligation to pay to the bank anything towards the principal sum or towards the interest; therefore, the bank was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the company; the bank, in recalling the loan mid-term, had committed a breach of the agreement;

(ii) the loss of profits on the housing project which the company suffered was the natural and probable result of the breach of agreement by the bank and when the bank agreed to provide the bridging finance to the company, the bank well knew of the loss that the company would incur should the bank break the contract; in relation to this, the total net profit of the Dungun project,

estimated at RM5,394,722 by the quantity surveyor, was preferred to the assessment of RM6.2m made by the learned trial judge

(iii) the loss of profits claimed in respect of the Alor Gajah 'project' was dependent on the application of profits expected from the Dungun project and would be too remote and should not be allowed; the learned trial judge's award of RM6m was therefore set aside;

(iv) the company had not established its claim for exemplary damages and therefore the award of RM6m made by the learned trial judge in this respect should be set aside;

(v) the company's claim for reimbursement of damages paid to third parties had not been properly substantiated as no evidence was adduced from the third parties that they had received damages from the company; the learned trial judge's award in this respect should be set aside;

(vi) the dismissal of the bank's claim in respect of the sum owing by the company to the bank on the overdraft facility on the ground that it was in breach of contract in recalling the overdraft prematurely could not be justified; the bank is entitled to repayment of the loan with interest up to the date when the overdraft was prematurely withdrawn; the bank was also entitled to simple interest under the Rules of the High Court 1980.

[35] We are of the view that the circumstances in the instant appeal are clearly distinguishable from those in *Mae Perkayuan*. In *Mae Perkayuan*, the company had already obtained all the necessary approvals including a housing developer's licence; at p 85 of the report, Abdul Hamid Omar LP said:

> In any event, before the overdraft facilities were terminated he had already obtained all the necessary givernment approvals including a housing developer's licence. The only licence which had then yet to be approved by the government was an advertising and sale permit without which the first respondent would not be able to advertise in the newspapers about the sales of the dwelling houses and the shop houses to be built. He could begin construction of the houses only after getting all these necessary approvals from the government agencies as required by law. Up to the time of the termination of the overdraft facilities, a considerable sum of money had been spent by the first respondent but it had received no income because no sale and purchase agreement could yet be signed.

[36] The facts in *Mae Perkayuan* also showed that the company had completed the 'earthworks and site preparation' as a result of which the bank had disbursed part of the monies available under the first tranche, viz, the bridging loan. In the instant appeal, as far as the second tranche is concerned, the first respondent has yet to obtain a developer's licence neither is there any evidence to show it has commenced construction works. Part of the pre-disbursement conditions found in the said letter of offer and also the said amended letter of offer, including the requirement that the first respondent must possess a developer's licence, had yet to be fulfilled. Without fulfilling the pre-disbursement conditions, we cannot see how the monies available under the second tranche could be released to the first respondent. The monies available under the second tranche could only be released progressively against an architect's certificate of work completed for the said housing project.

[37] Further, in *Mae Perkayuan*, it was found by the court that the reason why the bank recalled the loan was solely because the company had not paid the interest. It was found that the bank never notified the company that if interest were not paid, it would recall the loan. It was also found that nowhere in the bank's letter of offer was it stated that the company was required to pay the interest monthly or at any other intervals. In the instant appeal, it was clearly stated in the said amended letter of offer that interest had to be serviced monthly. The documents adduced at the trial clearly showed that the first respondent had admitted and accepted this condition that it had to service the interest on a monthly basis. As pointed out earlier, the first respondent had even, by letter dated 22 October 1985, requested that it be allowed to utilise the balance of the monies under the first tranche to pay for interest outstanding under the said facility which had by then amounted to RM13,940.56. The first respondent knew it had to service the interest on a monthly basis but chose not to do so notwithstanding it had in fact expressly agreed to service the interest monthly. Furthermore, in *Mae Perkayuan*, the bank withdrew the facility without prior demand being made whereas in the instant appeal several letters of demand with copies extended to the directors and/or guarantors were sent requesting the first respondent to service the monthly interest.

[38] As far as the first tranche under the said facility in the instant appeal is concerned, we are of the view that that part of the said facility cannot be described as a 'bridging loan' as the purpose was solely for the purchase of the said lands prior to development. According to the judgment in *Mae Perkayuan*, a bridging loan is a type of facility that is given to cover the period between the time when construction had begun until it is completed and 'the finance is to bridge the period between the time when the developer starts to prepare the ground works and the period when the developer will start to receive the proceeds of sales of the houses from purchasers which is when the sale and purchase agreements are signed'.

[39] In relation to the second tranche of RM1m in the instant appeal, the appellant's counsel conceded in his submission that that part of the said facility may well be considered as a bridging loan but as this tranche has yet to be applied for release and could not under the circumstances be applied for as the first respondent has yet to comply with the pre-disbursement conditions, it is not an issue in these proceedings. We would fully agree with this contention. We cannot fathom the objective of the respondents in raising the contention that the said facility was a bridging loan. The first tranche was clearly not a bridging loan. It was an overdraft facility to purchase the said lands. That part of the facility was for the first respondent to utilise to purchase the said lands but the facts showed it was the third respondent who was the purchaser. Be that as it may, upon seeing that the said lands were to be developed under the name of a third party, viz, the third respondent, the appellant in the said amended letter of offer required the first respondent to forward an irrevocable power of attorney to be given by the third respondent as land-owner to the first respondent.

[40] On the whole, we are of the view that the only issue in these proceedings was whether the balance of the first tranche amounting to RM108,800 ought to have been released to the first respondent. We have adumbrated earlier that we were of the

view that the appellant was under no obligation to release the said sum of RM108,800 to the first respondent to utilise the monies for purposes other than for the purchase of the said lands. In *Mae Perkayuan*, we noted that the letter of offer there provided that the purpose of the second tranche of RM2.1m was to purchase the Alor Gajah land 'including incidental cost of RM100,000'. In the instant appeal, there was no such provision for any 'incidental cost'. Under the circumstances in the instant appeal, no such words appear and that being the case, we cannot see how it can be argued that the appellant was in breach of the agreement by failing to disburse the balance of the monies under the first tranche to pay for any 'incidental cost' including interest outstanding under the said facility. We are of the view that the decision in *Mae Perkayuan* has no bearing upon this instant appeal. The facts there were clearly different.

[41] In conclusion, we are of the view that the appellant was never in breach of the terms and conditions of the said facility when it did not release the balance of the monies to the first respondent under the first tranche. In relation to the second tranche, we would agree with the submission of the appellant that it was a non-issue in these proceedings. The monies available under the second tranche cannot under the circumstances be released to the first respondent as the first respondent has failed to comply with the pre-disbursement conditions. That being the position, we cannot see any merits in the respondents' defence and set-off. The respondents are liable to pay the sum claimed by the appellant as per its statement of claim. The first respondent was never in a position to proceed with the development of the said housing project as it did not possess a developer's license at the material time. We would agree with the contention canvassed by the appellant's counsel that the first respondent could not have suffered any loss or damage as it was, at all material times, not even in a position to commence construction. In our view, the learned trial judge erred in accepting the first respondent's claim that it had suffered loss and damages totaling RM520,946.82 'which was more than enough to extinguish' the appellant's claim notwithstanding there was no evidence to support or substantiate such a claim. The appellant was clearly not in breach of the terms and conditions of the said facility and had the right to recall the said facility on demand.

[42] We are also of the view that the second and third respondents are liable under the guarantee for the amounts owed inclusive of interest under the said facility. They executed the letter of guarantee dated 14 June 1985 and undertook to pay any monies owing or remaining due and unpaid to the appellant from the first respondent including interest and all cost charges and expenses which the appellant may incur in enforcing or seeking to obtain payment and to make good any default by the fist respondent.

[43] It is our view that the learned trial judge erred in dismissing the appellant's claim and hence this appeal must be allowed. We would accordingly set aside all the orders made by the learned trial judge and order that the first, second and third respondents pay to the appellant the sum of RM333,947.99 claimed with interest thereon at the rate of 14.25%pa on monthly rests basis from 1 June 1986 until payment with costs on a solicitor and client basis as prayed for. We would also order

that the first, second and third respondents pay the costs of this appeal to the appellant and order that the deposit be refunded to the appellant.

[44] We heard this appeal on 17 August 2004 and at the conclusion reserved our judgment. A member of the quorum, Ariffin Jaka JCA retired before this judgment was written. This judgment is the opinion of the majority of the remaining judges of the quorum given pursuant to the provisions of s 42 of the Courts of Judicature Act 1964.

Appeal allowed.

Reported by John Paul Simon